# DISTRICT OF COLUMBIA
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| DISTRICT OF COLUMBIA<br>DEPARTMENT OF HEALTH,<br>Petitioner,<br><br>v.<br><br>EASTER SEALS SOCIETY, INC.<br>and KELI HANNAN,<br>Respondents | Case No.: I-00-40102 |

## FINAL ORDER

## I. Introduction

By a Notice of Infraction served on July 3, 2000 and pursuant to the Civil Infractions Act of 1985 (D.C. Code § 6-2701, et seq.), the Government charged Respondents, Easter Seals Society, Inc. ("Easter Seals") and Keli Hannan, with violating 29 DCMR 328.1 which requires persons who operate child development centers within the District of Columbia to provide a suitable space for outdoor play.[1] The Notice of Infraction alleged that the violation occurred on June 27, 2000 at the Easter Seals Child Development Center, which is located at 2800 13th Street, N.W. Respondent Easter Seals operates the child development facility ("facility") at issue. Respondent Keli Hannan was the facility's director at the time of the charged infraction.[2]

[1] 29 DCMR 328.1 provides that: "[s]uitable space for outdoor play shall be provided. This space shall be free from conditions which are or may be hazardous to the life or health of the children or infants."

[2] It was reported by Easter Seals' authorized hearing representative that Hannan terminated her employment relationship with Easter Seals on or about August 25, 2000. She remains as a Respondent, however, because she has been charged individually by Notice of Infraction.

Respondents filed a timely answer, plea of Deny, and request for a hearing. On September 13, 2000, this administrative court held a hearing, and the following witnesses testified: Pushpa Agarwal, the charging inspector; Sharon Hedgepath, the facility's current director, and Carmen Von Hewitt, who identified herself as the facility's nurse. Respondent Hannan failed to appear although the administrative court's case record reveals that she was duly served with a hearing notice by mail - a fact confirmed by Ms. Hedgepath. Ms. Hedgepath stated that she was in contact with Respondent Hannan and that Ms. Hannan had received notice and was aware of the hearing date. Therefore, this administrative court ordered the hearing to proceed in Ms. Hannan's absence pursuant to D.C. Code §§ 6-2712(a)-(b). The Government appeared by its counsel, Nan Reiner, Esquire, and Carolyn Sims, Esquire. Respondent Easter Seals was not represented by counsel and was represented by Ms. Hedgepath who affirmed that she was authorized by Easter Seals to act as its hearing representative. The Government timely submitted several exhibits, labeled as Exhibits 100-103 ("PX-100, PX-101, PX-102, and PX-103") that were later admitted into evidence.

This case centers on the issue of notice. It is undisputed that Respondents had the legal right to remove or "de-program" the play area from the regulated program areas of the facility. To do so, however, Respondents were required to give the Department of Health timely notice of a program space change under 29 DCMR 304.4. As discussed below, Respondents failed to do so in this case and Respondents are therefore liable for the charged infraction.

## II. Summary of the Evidence

### A. Conditions of the Play area

Through Ms. Agarwal's testimony, the Government asserted that on June 27, 2000, Ms. Agarwal and an assistant went to the Easter Seals child development facility to conduct an unannounced inspection. On their arrival, an employee at the facility told them that the facility's play area was closed. Ms. Agarwal noted problems with the play area in a report entitled "Statement of Deficiencies and Plan of Correction." The report, admitted as PX-101, noted the presence of overgrown bushes; dirty toys and equipment; frayed wooden surfaces in disrepair; and a dangerous metal ramp. She also testified that there was an absence of wood chips and rubber matting for safety[3], and that the sandbox was devoid of sand.

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[3] It is unclear whether the charging inspector was sufficiently qualified to testify as an expert witness with regard to when the condition of a play area groundcover may constitute a "[hazard] to the life or health of children or infants" in violation of 29 DCMR 328.1. To render such an opinion, some form of objectively based risk assessment is required to determine whether there is in fact a "hazard," and because as a legal matter, the Government can only rationally be concerned with significant risk, not insignificant risk. Under the District of Columbia Administrative Procedure Act (D.C. Code § 1-1501, *et seq.*), an inadequately founded or standardless assessment would be arbitrary and therefore unlawful. *See, District of Columbia Hospital Assn. v. Barry,* 498 A.2d 216, 218 (D.C. 1985) (Rules promulgated pursuant to the D.C. Administrative Procedures Act must have a rational basis for their enforcement.); *Chemical Manufacturers Assn. v. EPA*, 28 F.3d 1259, 1268 (D.C. Cir. 1994). S*ee also, Center for Auto Safety v. Peck*, 751 F.2d 1336, 1345-48 (D.C. Cir. 1985) (discussing the distinction between significant and insignificant risk). Beyond the Administrative Procedures Act, the public also is protected from irrational and arbitrary government action as a matter of constitutional due process. *County of Sacramento v. Lewis*, 523 U.S. 833, 846-7 (1997).

The Court of Appeals has made clear that in the District of Columbia, a witness must be qualified as an expert to render a relevant opinion on the surprisingly technical issue of the sufficiency of a play area groundcover. *Messina v. District of Columbia*, 663 A.2d 535, 537 (D.C. 1995). The charging inspector and other inspectors carrying out similar duties are

Ms. Von Hewitt, testified that she was a nurse, an employee of the Easter Seals, and that she worked at the subject facility on the dates in issue. She asserted that she was present for the June 27, 2000 inspection and agreed that the deficiencies detailed on Ms. Agarwal's report (PX-101) constituted a health hazard to the facility's children. Easter Seals and the Government stipulated that the facility had been cited for similar problems on June 18, 1999. In that instance, the Government's inspector issued a Statement of Deficiencies, but no Notice of Infraction.

**B. Program Space**

Ms. Hedgepath testified that she had only recently become the director of the facility and that she was not present at the June 27, 2000 inspection. She testified that she was told that the play area space had been closed on June 27, but also admitted that she had no personal knowledge of when or whether her predecessor, Ms. Hannan, or the facility's staff had informed the Department of Health of the purported closure. Ms. Agarwal testified that the first play area

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certainly capable of acquiring expertise for the purpose of an administrative trial under the Civil Infractions Act of 1985, but on the present record, it is unclear that the inspector had received training on biomechanically derived groundcover standards as were discussed in *Messina*. *See* Fed. R. Evid., Rules 701 and 702. *See also, Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999). In support of her qualifications as an expert, the inspector testified that her training with regard to playground safety was based on review of a 100-page manual and on-the-job experience for two months with more practiced inspectors in which she was shown how to inspect generally for playground safety. The charging inspector testified that she did not receive any specific or other training regarding national or standards for play area groundcover.

Given the complex legal questions encircling the allegations regarding the adequacy of the play area groundcover in this case, the administrative court will not rely on the Government's proof on this issue to adjudicate this case. *See infra* note 4.

closure notice received by the Department of Health (under 29 DCMR 304.4) was the one given to her orally upon her arrival for the unannounced inspection on June 27, 2000.

To help support the Respondents' claim of timely notice to the government officials that the play area space was being de-programmed, Ms. Hedgepath drew the administrative court's attention to a letter from Respondent Hannan to the Department of Health dated June 28, 2000 (admitted as PX-103). In that letter, Respondent Hannan stated with regard to the play area that: "*I noted these [play area] safety concerns over one week ago and closed the playground to our children on June 16, 2000*." Ms. Hedgepath argued that the referenced language in Ms. Hannan's letter evidenced not only that the play area had been closed voluntarily, but also that Respondents had notified the Department of Health of the purported closure in advance of Ms. Agarwal's June 27 inspection (in conformity with 29 DCMR 304.4). Ms. Agarwal testified the Department of Health had received no information indicating that the play area space had been closed prior to her arrival for inspection on June 27.

Alternatively, Ms. Hedgepath asserted that Respondents met the regulatory requirement of 29 DCMR 304.4 because it was undisputed that Ms. Agarwal was told on arrival that the play area was closed. She contended, therefore, that the play area's condition could not form the basis of an infraction under 29 DCMR 328.1. Ms. Agarwal testified and the Government's counsel argued that such an eleventh hour oral notification at the start of an unannounced inspection was untimely and therefore insufficient to remove the play area from the facility's program space.

### C. Remediation

Finally, Ms. Hedgepath testified as a mitigating factor that the play area remained closed at the time of the hearing on September 13, 2000, and that it had been undergoing repairs and renovations for some time. She asserted that the closure would continue until all work was completed. The Government conceded these facts to be correct. Ms. Agarwal reported that by late July 2000, the play area was in, or close to, substantial compliance.

## III. Findings of Fact

The testimony of the witnesses revealed that there is only one material issue in dispute: whether the facility had met the requirement of informing the Government of the play area's closure and removal from the program space under 29 DCMR 304.4(a). This dispute has a factual component that will be treated in this section, and a legal component that will be treated in Section IV.

In her testimony, Ms. Hedgepath asserted that the fact of the play area closure noted in Ms. Hannan's June 28, 2000 post-inspection letter to the Department of Health (PX-103) demonstrated that the Respondents properly notified the Government before the inspector arrived and that the de-programming of the space was therefore lawfully accomplished. The Government argues that even if the letter is credited as showing a voluntary closure, the letter contains no language that can be reasonably be read as demonstrating that notice to the Department of Health was effectuated prior to the letter being sent on June 28, 2000, a day *after*

the inspection that gave rise to the charged infraction. While the Respondents' attempt to wring some inference of notice to the Department of Health from the Hannan letter is creative, the administrative court cannot make such a finding on this record. Nothing on the face of the June 28, 2000 letter expresses or credibly implies any prior notification to the Department of Health of the alleged closure pursuant to 29 DCMR 304.4. The post-inspection letter merely alleges that the play area was closed voluntarily. Therefore, the administrative court finds, by a preponderance of the evidence, based on exhibits and testimony received at trial, and direct observation of each witness and assessment of her credibility that:

1. Respondent Hannan was at all relevant times the facility's director and responsible for its operations;
2. Ms. Hannan received actual notice by mail of the September 13, 2000 hearing that she failed to attend. She has offered no explanation for her failure to attend;
3. Respondent Easter Seals Society, Inc. was at all relevant times the owner and operator of the licensed Child Development Facility at issue in this case;
4. On this record, Ms. Hannan's letter of June 28, 2000 (PX-103) does not credibly support a finding that Respondents notified the Department of Health that the subject play area was closed and removed from the facility's program space prior to June 27, 2000;
5. The first notice to DOH of a change in program space (de-programming) by closure of the play area was the oral notice Ms. Agarwal received on her arrival for unannounced inspection on June 27, 2000. The Department of Health was

informed for a second time of the play area closure through Ms. Hannan's June 28, 2000 letter sent after the inspection (PX-103);

6. It is uncontested and the administrative court finds that the following conditions[4] existed at the time of the inspection on June 27, 2000:

    a. the play area was dirty and needed cleaning;

    b. bushes were over-grown and needed trimming;

    c. play area equipment was dirty and needed cleaning;

    d. the play area ground surface was uneven; and

    e. wooden surfaces were frayed and needed repair.

7. It is uncontested and the administrative court finds that all of the foregoing conditions constituted a condition that was or could be hazardous to the health of children or infants;

8. It is uncontested and the administrative court finds that on June 18, 1999, similar play area deficiencies were noted by Department of Health inspectors when visiting at this facility;

9. It is uncontested and the administrative court finds that prior to it being de-programmed by notice, the subject play area was part of the facility's program space; and

10. Respondents have taken substantial steps to remediate the violation and there is no evidence of a continuing violation.

[4] The administrative court need not reach the allegation of insufficient playground groundcover to resolve this matter and will not in light of many unbriefed statutory and constitutional issues that would arise. *See supra, note 2.*

## IV. Conclusions of Law

A violation of 29 DCMR 328.1 is proven if it shown by a preponderance of the evidence that Respondents failed to provide "suitable space for outdoor play" which was "free from conditions which are or may be hazardous to the life or health of the children or infants." 29 DCMR 328.1.[5] A play area or other portion of a child development facility is only subject to regulation if it is part of the facility's regulated program space. A change in program space in a child development facility can only be accomplished by notifying the Department of Health. 29 DCMR 304.4.

As noted, Respondent Easter Seals does not contest the fact that the conditions described in Section III, Paragraph 6 of this Order existed and that they posed a significant risk to children's health on June 27, 2000 at the time of the inspection. Moreover, because the administrative court has found that PX-103 does not support an inference that notice occurred prior to the inspection, the sole remaining legal issue in this case is whether the play area – agreed by both sides to have been originally designated as program space by Easter Seals – was effectively removed from its regulated status by the oral notification given by Respondents on June 27, 2000 at the start of the inspection. Because the administrative court concludes as a matter of law that notice given at the start of an inspection cannot constitute legal notice of program space closure, the Government prevails on this issue and in this case.

[5] Respondent Easter Seals contends that it used a nearby playground area while its play area was allegedly closed, and that therefore the closure -- whenever it occurred -- did not form a basis for finding a violation of §328.1. The Government does not dispute this.

The procedure for reducing or altering an established program space is prescribed in 29 DCMR 304.4. The regulation requires that:

> [t]he licensee of a child development facility shall inform the Mayor of any change in the operation, program, or services of a child development facility of a degree or character which may affect its licensure. 29 DCMR 304.4.

Implied in the regulation is an element of timeliness. Informing government officials of a program space closure long after an inspection is clearly too late. If that were not the case, the regulation would be largely unenforceable because a Respondent, having been cited for a violation, could nullify the Government's case through a *post hoc* letter de-programming the offending space within a facility. Such a holding would frustrate important incentives for voluntary compliance with health and safety standards. Such compliance is a key objective of the District's childcare regulations and their enabling legislation, the Child Development Facilities Regulation Act of 1998. D.C. Code § 6-3601, *et seq*. For the same reason, permitting notice at a point after an inspector arrives to investigate or survey as happened here would eliminate an incentive for licensees to voluntarily comply with applicable regulations. It would encourage facilities to delay critical but costly safety repairs until violations are actually cited, or are about to be.

The administrative court is required to construe statutes and regulations in a manner that fairly effectuates their intent. *Davis v. United States*, 397 A.2d 951, 956 (D.C. 1979); and *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 754 (D.C. 1983) (en banc) (a court should interpret a statute to effectuate a clear legislative purpose.); 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION §46:05 at 167 (6th ed.

2000)(same). Here, that intent under 29 DCMR 328.1 is to ensure compliance with minimum health and safety standards in facilities, while providing the facilities the opportunity to alter program space to foster these objectives, not to frustrate them.

The administrative court therefore concludes that notice to the Government that space is being de-programmed given after the arrival of a Government official for an unannounced inspection cannot shield a Respondent from liability under 29 DCMR 328.1 because such notice is untimely and therefore inoperative under 29 DCMR 304.4.[6] Respondents are therefore liable as charged in this matter. Although Respondents took steps to abate their violation after it was charged, the administrative court concludes that because of Respondents' previous and recent episode of similar non-compliance relating to the play area, a downward adjustment of the specified fine is not appropriate here. D.C. Code § 6-2703.

## V. Order

Therefore, upon Respondents' answer and plea, the testimony and exhibits presented at the hearing, and the entire record in this case, it is hereby, this _____ day of _____, 2001:

[6] Because the notification was untimely and therefore insufficient, the administrative court need not reach the sufficiency of an oral (as opposed to written) notification as occurred here.

**ORDERED,** the Respondents are each liable for a violation of 29 DCMR 328.1 and are jointly and severally liable for the specified fine of **ONE HUNDRED DOLLARS ($100.00),** and it is further

**ORDERED,** that Respondents shall cause to be remitted a single payment totaling **ONE HUNDRED DOLLARS ($100.00)** in accordance with the attached instructions within twenty (20) calendar days of the date of mailing of this Order (fifteen (15) calendar days plus five (5) days for service by mail pursuant to D.C. Code § 6-2715). A failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondents' license or permit pursuant to D.C. Code § 6-2713(f).

**/s/ 2/6/01**

Paul Klein
Chief Administrative Law Judge